Supreme Court, U. S.
APR 30 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 643

PAUL DEEMER JOHNSTON AND JOHN SOKOL,
Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 704

UNITED STATES OF AMERICA, Petitioner

v.

DUDLEY A. PATTESON

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT REPLY BRIEF FOR PETITIONERS JOHNSTON AND SOKOL AND RESPONDENT PATTESON

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MAY IT PLEASE THE COURT:

The major points made by the Government in its brief will be dealt with according to subject first and then the minor points will next be taken up in the order in which they turn up in the brief.

I.

The basic thread used by the Government to weave its cloak of argument for a ruling in its favor is defective. The argument that is no good, on which the whole case of the Government rests, is merely an act of cutting out of the Selective Service process the vital and crucial order of the local board that was defied in these cases. (See the brief of the Government at pages 12, 14-15, 17-19, 20-24, 25, 31, 36 and 39.) Locating this faulty yarn in the fabric and pulling it out to its full length unravels the entire garment and leaves the final submission of the Government uncovered by respectable raiment. The final written order mailed to each registrant contained two orders. Read the commands of the order printed by the Government as the appendix to its brief at page 56. The first fiat of the order required that the registrants report to the local board. This the registrants did. The second command in the order was that they "proceed" from the board to the hospital, after receiving travel and work instructions. The registrants refused to do this.

The offense in each of these cases was committed when each registrant refused or—let us use the euphemism adopted by the Government—"failed" or "neglected" to take the next step commanded by the local board of proceeding from the board to the hospital. This refusal to step forward or proceed farther occurred in the district where the local boards were located, which is where each registrant balked. This unauthorized emasculation of the different and separate steps in the Selective Service process so as to transfer the offense, as a magician by slight of hand, from the district where the local board is located to the district where the hospital is situated—where no refusal or neglect to step forward and proceed occurred and nothing happened in these cases—produces nothing but confusion in the legal mind.

The extensive rationalization of the Government manufactures a factitious offense in a district foreign to the

real place of offense. This does nothing but compound the confusion created by the expunction of the order to proceed further by the local board from the process. The logistical legerdemain of the Government shows that it has done nothing less than follow the proverbial ostrich who put its head in the sand to avoid danger.

The best way to blow away the smoke of confusion that is in the eyes of the Government is to here make a hypothetical analogy. Let us take some assumed case close to home. Suppose this Court issued an order to one of its employees to go from this courthouse in Washington to the courthouse in Richmond to bring in a record made in a state case where certiorari had been granted. Assume that the employee had a defiant streak in him and said he would not go until he got good and ready. And he never got ready. He refused to go. This would be contempt, wouldn't it? Well, where would that hypothetical offense occur? In Washington or Richmond? What court would have jurisdiction of the contempt proceedings? In what place would venue lie for the offense: Washington or Richmond? The mere asking of these questions proves the answer: Washington! The same situation prevails in these cases. The local board, like this Court over its employees, has control at all times over the registrant while the hospital job of civilian work is being done. This does not change the venue of the crime based on the refusal to proceed to do the work. If anything, it strengthens the point that the offense occurs where the order was given, which is the place where the refusal to proceed to carry out the job took place. In these cases it is in the district where the local boards were located.

The registrants agree with the Government that not "until that fixed duty is breached does a violation occur." (See brief at page 14.) But the duty fixed by the act is "to perform any duty required of him under . . . directions made pursuant to" the act. (Section 12 (a), 50 U. S. C. App. § 462 (a)) Section 1660.30 of the Selective Service Regu-

lations, 32 C. F. R. § 1660.30, provides that failure or neglect "to obey an order from his local board" to do civilian work is a violation of the act.

The emphasis in the act and regulation is placed on the order of the local board. Without a local board, an order and a refusal or a failure to comply with the order there cannot be an offense. The important question to consider is: Where is the local board located and in what district did it issue the order? In what district were the directions to travel given? The next one is: Where did the refusal to obey them or the failure to take the step ordered by the board take place?

In determining where the failure or refusal to act took place, it is important to consider where the orders were given and where the step first required to be taken must begin or take place. In these cases there is no question that the order to proceed from the local board to the hospital was given in the district where the local board is located and, if complied with, the starting of the trip would have taken place in the district where the local board is located. The failure or refusal to take the further step or proceed on likewise took place in that same district.

The Government admits that the link in the chain, traveling or proceeding from the board to the hospital, is required by an order of the board. (See page 32 of the brief.) It does not deny that only by traveling or proceeding can the registrant get to the hospital. But it is said in the case of the conscientious objector that the necessary travel is unimportant. (See page 32-33 of the brief.) The admitted necessity to take the step is declared to be wholly irrelevant and immaterial to the process in conscientious objector cases. It is said (brief, p. 32) that the link of travel in the conscientious objector process to get him to the hospital has absolutely nothing to do with the case because: Why, he has discretion as to the time of his departure! Doesn't he pay his own way? Can't he choose his own means of travel? So says the Government.

So what! What has this got to do with the link in the chain? The registrant still has ahead of him the vital link of "proceeding" from the board in the process. This must be traversed before he gets to the hospital. Unless and until he gets to the hospital he cannot accept employment. If he does not get to the hospital he cannot refuse work the hospital has picked out for him. His selected employer can give him no orders until he comes to the place of employment and he sees and talks to the designated employer. It is manifest, therefore, that proceeding or traveling is a material, necessary and irremovable link in the chain of Selective Service proceedings to get the registrant, who is classified as a conscientious objector, to the hospital.

That the registrant can take off from his home late by airplane on the very day he is to report and get to the hospital on time, or that he can go slow, taking it easy on a burro after leaving days before he is to report and still get there on time, or that he pays for his means of transportation—none of these changes reality to the fiction produced by the Government. He has to travel somehow to get to the hospital, doesn't he? He must proceed some way and leave sometime to get to the hospital on time when ordered by the board. Since this is so, isn't his travel or proceeding a necessary link in the chain? How can it be said that it is not and has nothing to do with the case?

The Government says, however, that the link in the chain of proceeding or traveling by the selectee classified for induction into the armed forces is vital and a necessary link. (See the brief at pages 33-34.) It is also admitted, under the Selective Training and Service Act of 1940, that the travel of the conscientious objector was a vital link. (Br. pp. 35-36) The Government concedes that a failure to take such steps by the selectee to get traveling from the local board to the induction station is an offense committed in the district where the local board is located. A conscientious objector who refuses to proceed from the board to the civilian public service camp under the 1940 Act is con-

fessed to have violated the law in the district where the local board is located.

The specious basis for the Government not making such a concession for the conscientious objector under the present act, however, is that he is not "delivered." (See the brief at pages 28-29.) The term "delivered" is not mysterious. By it is meant he was given a bus or railroad ticket by the local board, in addition to his travel instructions, as do the present selectees and did the conscientious objectors under the 1940 Act. This difference, lack of delivery of tickets to the registrants classed as conscientious objectors, is entirely immaterial. It does not change the reality that all registrants at all times and in all classes must proceed or travel the link in the process, the distance it takes to get to the induction station, to the civilian public service camp or to the hospital under the present act regardless of how he gets his ticket. Whether he pays for it or the Government buys it is immaterial.

The simulated distinction made by the Government is a mere distinction without a difference. It strives in vain to remove the link and produce a vacuum. But it fails. Since it is "failure" or "neglect" or "refusal" to take the step required or traverse the link that makes the offense, and inasmuch as such omission occurred in the district where the local board is located, it must be held that the offense was committed where the local board is located and not in the district where the hospital is situated. Because of the foregoing the registrants are happy to agree with the Government on the main point, which is that "the district in which the hospital is located has no connection at all with the crime with which they have been charged." —See the brief at page 49.

II.

The sophistry of the Government has caused it to be caught off base and it should be put out of the running. The reason is because it says that any "refusal" has nothing

to do with the offenses committed here. (See the brief at pages 2, 7, 9, 10, 12, 14, 15, 42-46.) In all three cases the records show that each registrant appeared at his local board and there refused to act. He told the board, either orally or by letter, that he was not "proceeding" as ordered to the hospital. But the Government says that this act of refusal committed by each registrant has nothing to do with the cases. Why? Because the Government blandly conceals that refusal under a blanket of darkness.

It then, in this darkness, spotlights the hospital and brings into light the next step, the prospective work there designated by the local board. It proceeds to build high its castle on sand by saying that by this anticipatory breach of the law the registrants here "neglected" and "failed" to do work at the hospital. Because it relies upon this hypothetical anticipatory breach of the law that never occurs and it also refused to bring into light the actual "refusal" of the registrants to proceed further, made at each local board, the Government then advances the naïve contention that there was no refusal committed in the cases at all. It says, however, that there was a mere neglect or failure to do work at the hospital as a result of the apparition of the anticipatory breach that never occurs at the hospital.

This again is just another instance of ignoring reality by the Government, which is the act of refusal by the registrants at the local boards to proceed to the hospital. This refusal to proceed, which took place in the districts where the local boards were located, is *ab initio* the offense. This is so regardless of whether it is euphemistically stated by the Government that each registrant merely "neglected" or "failed" to show up for the anticipatory breach of the law at the hospital. It seems that this undeniable fact is a flood large enough to wash away the foundation of sand supporting the governmental structure. It causes its castle of argument to collapse.

It is said time and time again in the Government's brief that the registrants are not being prosecuted for their

defiance. The Government winks at this act at the boards and adds that they are only being prosecuted for their subsequent failure to appear at the hospital. This turns the link in the chin around and puts the tail end of the link in the chain where the head of the link is. This reversal of the process so as to spell "failure" instead of "refusal" should not be accepted. This Court should not be deceived by the misnomer of "refusal" as mere "failure" and "neglect." Also be free from the sophistry of anticipatory breach of duty at the hospital stressed by the Government. The Government makes the offense an anticipatory breach of duty, as above shown, by reversing the link in the chain so as to eliminate the proceeding to travel from the board. This is anathema to be avoided. Shun it now.

It is to be noticed that the act, in the sanctions clause, uses the word "refusal" as well as the words "neglect" and "fail." (Section 12 (a), 50 U. S. C. App. § 462 (a)) But the conscientious objector section of the law simply says that one who "fails or neglects to obey any such order" shall be deemed to have "knowingly failed or neglected to perform a duty required of him" under the act. The sanctions clause is broader and prevails over the declaratory conscientious objector clause, which neglects to mention the word "refusal."

It is absolutely unreasonable to say that Congress, by this indirect manner, intended the conscientious objector clause to be a special venue act to cover conscientious objectors in situations like this in these cases. When Section 6 (j) was written, Congress did not have in mind making it a special venue section. Had it so intended, then surely Congress would have been explicit and not left a vacuum to speculate in. Congress did not intend to allow the Government to read between the lines and import into the act all the pages of its proposed legislation that it has asked this Court to put into the section by accepting what it says in its brief in these cases.

The unsoundness of the argument of the Government about "refusal" being out of the law, as far as conscientious objectors are concerned, is manifest. To accept the argument means that Congress did not intend to punish a conscientious objector who "refused" to do his duty but meant to excuse the defier of the law and intended to penalize only those who simply "neglected" or "failed" to perform the acts required by the local board. The mere statement of this consequence of the Government's argument spews it out of the mouth of reason and statutory interpretation. Nothing more need be said about it.

III.

The question presented by the Government on pages 2 and 3 of its brief is too restrictive. It leaves out the element of refusal to perform the civilian work or proceed farther from the local board, which is the only act giving any rise to any offense in these cases. The Government also overlooks entirely the order of the local board to proceed from the local board to the hospital, a link in the process that has been ignored by the Government.

IV.

The Government at the bottom of page 6, emphasizes the statement by the Court of Appeals for the Tenth Circuit that the "refusal" of Patteson occurred when he notified the local board in Oklahoma that he would go no farther. This is a correct statement of the facts that, accompanied with his failure to proceed to the hospital, gave rise to the offense or failure to proceed to the hospital. There is nothing erroneous in this quoted statement made by the Court of Appeals for the Tenth Circuit in the *Patteson* case.

V.

The Government states that the terms of the orders to report for hospital work sent to each of the registrants in these cases are highly significant. (See the footnote at

the bottom of page 8.) The registrants in these cases agree with the Government. The written order to report contains the second order which was defied at the Board. It was to proceed to the hospital. The significance of this order has been entirely submerged by the Government as a part of the process and in discussing the offense alleged in these cases.

VI.

The statement made by the Court of Appeals for the Tenth Circuit in the *Patteson* case about the offense of refusal to proceed to Topeka occurring when "he notified his local board in Oklahoma that he would go no further" is criticized by the Government. (See page 18 of the brief.) This statement in the opinion of the Court is correct when the facts of the *Patteson* case are considered. It is true that the offense occurs when the registrant fails to proceed from his local board to the hospital; yet his stated refusal combined with failure to proceed constitutes the offense.

VII.

While the statement of refusal by a registrant may not fix the *situs* of the crime, as stated at the bottom of page 18 of the Government's brief, this Court should keep in mind that it is the place of the failure and refusal of the registrant to proceed as ordered by the local board that determines where and when the offense was committed. (See the Government's brief at the bottom of page 18.) The venue and jurisdiction of the offense is to be determined by the location of the local board and the terms of the order as to where the registrant is to proceed from. This factor has been entirely overlooked by the Government.

VIII.

At the middle of page 19 of the brief the Government states that after reporting at the local board, the next duty

of the registrant "is to appear at the place of employment at the subsequent time." This statement is only partly true. But it overlooks entirely the specific order of the local board to take the first step or proceed from the place where the local board is located to the place where the hospital is. It is the failure to thus proceed from the board that constitutes the offense. The anticipatory offense, at a subsequent time at the place where the hospital is located, never occurs as suggested by the Government. While the registrant must appear at the hospital, it should be remembered that he must first travel from the place where the board is located before he can get to the hospital. The failure to travel from the board is the omission that constitutes the offense in this case.

IX.

It is stated by the Government on page 20 that the argument of the registrants, that the duty to proceed from the board that was violated constitutes the offense, is an "erroneous premise." The order of the local board entirely supports the position of the registrants. It tells the registrants, after reporting at their boards, that they will be "given instructions to proceed to the place of employment." A reading of the order shows that the first order of the local board is to report to the local board. The final part of the order explicitly states the offenses that are involved in failure to comply with the regulations. The order, among other things, reads "failure to report at the hour and on the day named in this order, or to proceed to the place of employment pursuant to instructions, or to remain in this employment the specified time will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both."—See the Appendix to the Government's brief on page 56.

This quoted part clearly shows there are a total of three orders given by the local board, two of which are involved

here. The first is to show up at the board at the hour and on the day named. The second is then to "proceed to the place of employment pursuant to instructions" from the local board. The third order requires performance of work after enrolling at the hospital. The order here quoted entirely refutes the contention of the Government about there being no duty breached by the registrant after he reports to the board until he fails to appear at the hospital at the time appointed.

It is to be observed from a reading of this order that there is no time fixed for the registrant to report at the hospital. The time is fixed for him to report at the local board by it in the instructions handed to him, and he then proceeds from there to the place of employment "pursuant to instructions."

X.

The Government, in the subheading of its argument on page 21 of its brief, states that the registrant "has no duty other than to report for employment" after reporting to the local board. This statement, like the entire argument of the Government, overlooks the earlier and separate duty to proceed from the board to the place of employment which is a separate link in the proceedings entirely overlooked by the Government.

XI.

The part of the order quoted on page 23 of the Government's brief shows the responsibility to proceed to the hospital after reporting to the board as the second link in the proceedings. The Government overlooks the order of the board to the registrant commanding him to proceed to the place of work. The Government, on this page, merely states that "he is given more detailed instructions explaining the precise time and person to whom he must report at the place of employment."

This statement of the Government overlooks the step or link in the process following such instruction, which is to travel from the board area to the place of employment. This step begins at the place where the board is located and not at the place where the employment is to be performed.

XII.

At the top of page 24 of the Government's brief, it is emphasized that the travel of the conscientious objector under the regulations from the local board to the hospital is not supervised by some Selective Service official that "entrains such registrant." It is said that how he gets to the place of designated employment is a matter of his own choosing. This is quite true, but it does not in any sense of the word affect or alter the nature of the earlier step in the process not taken by the registrants in these cases. The prior link in the process defied is proceeding from the board to the hospital, which defiance or failure occurred in the district where the local board was located and not where the hospital was situated. The statement by the Government on page 24 that the next duty owed by the registrant is "to appear physically at the place of employment at the appointed time" entirely skips and overlooks the process of proceeding from the board to the place of employment. Without such link or step in the process he cannot appear at the place of employment.

XIII.

In footnote 6 on page 24 emphasis is placed upon the procedure prescribed for the travel of selectees for induction from the board to the induction station. It is pointed out that one of the selectees is appointed a leader and by such means a group is delivered to the induction station. Whether the travel of a registrant is in a group or is under the leadership of another selectee is entirely irrelevant and immaterial. The travel by a conscientious objec-

tor from his local board to the place of doing the work is the same sort of link in the Selective Service process as is the travel of a selectee from the board to the induction station. There is no distinction and that attempted to be made by the Government is one without a difference.

XIV.

It is said on page 25 of the brief that the registrant does not pass from the jurisdiction of the local board to that of another authority. It is then added that the employer has no official position in the Selective Service System similar to that of a camp director of a C.P.S. camp under the Selective Service Regulations for the operation of such camps pursuant to the Selective Training and Service Act of 1940. This argument, while true, is entirely irrelevant.

Now, as under the 1940 law, the Selective Service Director has control and supervision of the conscientious objector from the time of his being ordered to do alternate work in lieu of induction to the time of finishing such work. The camp director under the 1940 Act was an agent of the National Director under the regulations. While the hospital is not under the supervision of the Selective Service System, the registrant forced by law to accepting employment there is under orders of the Selective Service System at all times while he remains at the hospital. Except for such orders he would not be at the hospital. While there is no passing from the jurisdiction of the local board to another authority, it is immaterial. The Selective Service System now, as under the 1940 Act, has full control and supervision over the action of the registrant classified as a conscientious objector to do alternate civilian work.

XV.

The Government again on page 25, by saying "his next duty under the order is to appear at the place of employment," ignores and overlooks the specific order of the local

board to proceed from the board to the place of employment, a vital link, the refusal of which to take, in these cases, constitutes the offense.

XVI.

On page 28 of the brief, the Government states that it was necessary for the registrant under the 1940 Act, after reporting to the local board, to immediately travel to the CPS camp. It is stated that he was thereafter "constructively delivered to the point of departure." So it is under the present regulations. The registrant must report at the local board on a day and at an hour specified and thereafter he is constructively delivered to the hospital by oral orders and written instructions to proceed forthwith to the hospital.

XVII.

The Government argues that under the 1940 Act a registrant was no longer under the jurisdiction of his local board after he started traveling to the camp. It is correctly stated that then it was he became subject to the exclusive directions of the Director of Selective Service rather than the local board. (32 C. F. R. § 652.13) But this difference is entirely irrelevant. Under the 1940 Act a registrant who appeared at the local board and refused to start traveling pursuant to the orders of the board was still subject to the jurisdiction of the local board. Since in these cases the registrants did just that, there is no materiality in the argument of the Government on page 29, about the jurisdiction of the local board under the 1940 Act ceasing after the registrant began to travel. This argument of the Government boomerangs against it. It shows that under the 1940 Act the jurisdiction of the local board ended at the time the travel began, whereas under the present act the jurisdiction of the local board does not end even after the registrant gets to the hospital and begins working.

XVIII.

In footnote 9 appearing at the bottom of page 29 the practice about conscientious objectors traveling individually under the 1940 Act and being met by the Government truck from the camp is submitted as a relevant factor. This method of travel and procedure under the 1940 Act has no relevance to the question involved in these cases.

XIX.

In the footnote on pages 30-31 of the Government's brief irrelevant talk is made about the failure of a registrant to exhaust his administrative remedies. *Falbo* v. *United States*, 320 U. S. 549, is cited, but there is no failure to exhaust administrative remedies involved in these cases. (See *Dodez* v. *United States*, 329 U. S. 338.) This Court is not concerned with whether the registrants exhausted their administrative remedies. Here the only question involved is where did the offense occur. The suggestion made at the bottom of pages 30-31 in the footnote is entirely irrelevant.

XX.

It is said on page 32 of the brief that the second duty of the registrant after reporting to the local board is to "then report at the place of employment" for assigned duties. It is then added that because the written order does not deal with the time they are to depart and the mode of travel the order "cannot be the basis of a further duty to proceed on the trip to the place of employment, breach of which would be a separate and distinct crime."

This statement on page 32 of the Government's brief is challenged as being absolutely contrary to fact and law. The order specifically provides for the link of travel from the board to the hospital. This link is a separate and distinct duty from acceptance of employment after reporting to the place of employment. This argument of the Government does nothing but cut out of the process the vital step,

the refusal to take which in these cases constitutes the offense.

XXI.

The fact that the registrant is allowed discretion as to how he shall travel, whether by fast or slow means, is entirely irrelevant. Regardless of the means employed to travel, the link of travel or proceeding from the board to the hospital is necessarily implied as a connecting link in the Selective Service process that has been omitted by the Government in these cases.

XXII.

At the bottom of page 32 of the brief it is stated that no offense can be committed until the registrant fails to report at the hospital "for work as ordered." This argument of the Government has throughout the brief overlooked the vital link of proceeding from the board to the hospital.

XXIII.

Dodez v. *United States*, 329 U. S. 338, is attempted to be distinguished on pages 33-34 of the brief. It is said that Dodez mailed his letter refusing to report for work to the local board. That Dodez informed the local board in writing of his refusal and the registrants in these three cases notified the board orally and by personal delivery of a letter of refusal is immaterial. The delivery of the letter to the board containing the refusal by Dodez constituted his constructive reporting; for all practical purposes, the facts in the *Dodez* case are identical to the facts in these cases.

It is suggested at the bottom of page 33 that the *Dodez* case would be in point if these registrants had failed to report to their local board "in compliance with the first Order on the form they received." This is ridiculous because there still would be no difference in the refusal to proceed to the place of the performance of civilian work.

With tongue in cheek the Government again naïvely suggests that, if these registrants had done what Dodez did, fail to show up at the local board, they would not have exhausted their administrative remedies. (See footnote 12 on page 34 of the Government's brief.) This suggestion flies in the teeth of the *Dodez* opinion itself, which contradicts the suggestion of no exhaustion of administrative remedies. Remember that the final armed forces physical examination in these cases, like that in the *Dodez* case, had been completed before the registrants were ordered to do the civilian work.

XXIV.

The attempt to distinguish *Dodez* v. *United States, supra,* from these cases, at the top of page 35, also falls flat. It is stated that the registrants here are not being prosecuted for failure to report to the local board. It is also said that the orders of the local boards in the present cases do not involve an obligation to "submit to delivery to an authority other than that of the local board." Insofar as that difference is concerned, it is insignificant and immaterial. The refusal in either case would be a disobedience to the local board order which was committed in the district where the local board was located.

There is nothing mysterious or distinctive about "submit to delivery" required of conscientious objectors under the 1940 Act. While the conscientious objector was not subject to the local board while performing civilian work in the CPS camps, he was subject to the continuing jurisdiction of the Director of the Selective Service System.

Insofar as "delivery" is relied upon as a distinction, there was nothing to that different from the present delivery of a conscientious objector to a hospital, other than that the registrant was given a bus or railroad ticket providing him with the specific means of travel free of charge to him. The reason the old law provided transportation free of charge while the new law does not is that a conscien-

tious objector received only meager compensation for work in the CPS camps while now he is employed on the standard wage scale paid by the hospital to other employees doing similar work.

XXV.

The Government suggests that there is inconsistency in the argument made by the registrants in their brief. (See the brief for the Government at the top of page 36.) It has never been suggested and is not now argued that the failure to "leave home" is the gravamen of the offense. In these cases the homes of the registrants were located in the places where the local boards were situated. The inadvertent use of the word "home" in the main brief was not intended to imply that the residence of a registrant fixed the place of prosecution. Admittedly this does not. It is the place where the board is located and the place where the order was made, which is where the order was defied, that determines the district where the prosecution should be brought.

XXVI.

At the bottom of page 36 an entirely erroneous statement is made by the Government. It is "failure to leave the local board and continue on the journey" to the hospital is not a definable offense. It is added erroneously that the registrant need not "depart immediately." This may or may not be the case. Usually the board gives the registrants instructions to leave forthwith. On rare occasions they may allow them more time to travel to the hospital. In practically every case there is a command to leave as soon as transportation facilities permit. The statement, therefore, made at the bottom of page 36 and at the top of page 37 is incorrect.

There is, moreover, a very definable offense committed when the registrant fails to leave the place where the local board is located and proceed to travel to the place where

the hospital is located.—See the order of the local board appearing on page 56 of the Government's brief.

It is argued that the discretion on the part of the registrant as to the means of travel eliminates from the case any offense in failure to proceed from the local board because "there is no fixed duty to proceed at any certain time and place." It has been pointed out heretofore in this reply brief that this argument is fallacious. The duty to proceed is explicit in the order and the responsibility to travel from the local board to the hospital is a duty imposed by the act which, if not performed, constitutes an offense.

XXVII.

At the bottom of page 38 of the Government's brief it is stated that the registrants said in their briefs that the statement of refusal to the local board was evidence of "their future intent" and not a criminal act itself. This is not an accurate representation of what was said in the main brief. While the declaration of a refusal to proceed to the hospital is evidence of the crime, it does not constitute the crime itself. There was, moreover, no statement made by the registrants anywhere in their brief that it was a declaration of a "future intent." It was a declaration of a present state of mind in respect to a present order that they would not proceed from the board made by the registrant at the time and place they reported to the local board. The argument of the Government therefore confuses the contention of the registrants made in the main brief and ought, accordingly, to be discarded.

XXVIII.

The statement made at the bottom of page 41 by the Government that the offense in the *Johnston* and *Sokol* cases occurred in the Eastern District of Pennsylvania where the hospital was located and "the crime charged was committed there, if at all" is here challenged as being

an incorrect statement of the law. This statement again overlooks entirely the specific duty on the part of the registrant to travel from the local board to the place of employment.

XXIX.

The statement made by the Government on page 43 of its brief "the omission to act cannot be made to rest solely on expressed or implied statements of refusal" is a correct statement. This Court should, however, bear in mind that the expressed or implied statements of refusal by failing to proceed to the hospital may be considered along with other facts in determining whether the offense has or has not been committed as charged in the indictment.

XXX.

The Government states on page 43 of the brief that the written order to report for civilian work in the second order specified therein, to report at the place of employment, is a command to do "an act at the place of employment." This statement by the Government again overlooks the vital step of proceeding from the board to the hospital.

The interpretation put upon the order by the registrant is supported by the written order itself. In defining the offense committed in failing to report at the hospital the order specifically states that the failure "to proceed to the place of employment pursuant to instructions . . . will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both." This part of the order, which appears on page 56 of the appendix to the Government's brief, shows conclusively that the second order specifically required a duty to "proceed" from the local board to the place of employment.

XXXI.

The Government criticizes the opinion in the *Patteson* case because the Court of Appeals for the Tenth Circuit "does not suggest what the results would have been" had the registrant said nothing and done nothing. The opinion of the Court in the *Patteson* case makes plain that it was his failure to proceed farther regardless of what he said and when he said it, that constituted the offense. The opinion answers the criticism of the Government made at page 44 of its brief.

XXXII.

The Government argues on page 45 that the registrants in their brief make an "awkward attempt to change what is essentially a crime of omission into a crime of commission." While the registrants will not take time to debate whether their brief on this point is "awkward," they do challenge the statement made that they have attempted to change a crime of omission into a crime of commission. At all times throughout the proceedings in these cases the registrants have held that the crime charged is solely that of omission. It has never been suggested, and is not now argued, that the acts of the registrants in refusing to comply with the order of the local board constituted a crime of commission. The argument of the Government is frivolous—pure and simple—and ought to be disregarded as such.

XXXIII.

It is quite easy to answer the hypothetical statement made by the Government in its brief on page 45. The question is asked as to what would happen had the registrant "gone to a third district 'refused' to proceed further." The answer to all these hypothetical cases stated by the Government here and elsewhere in the brief about the registrants' changing their minds before they get to the hospital is plain and simple.

Unless and until the registrant has gone to the hospital and there enrolled and accepted employment, he has defied the order of the local board: not in the district where the hospital is located but only in the district where the local board is. No offense can be committed in any district other than where the local board is located unless and until after the registrant has registered in at the hospital, accepted employment and then undertaken his duties.

Following such acceptance of employment, if the registrant leaves the hospital and quits work, he will then be guilty of an act of commission, namely: leaving the hospital in defiance of the local board's order. This act of commission against the local board's order would occur in the district where the hospital is located.—See *Gibson* v. *United States*, 329 U. S. 338.

XXXIV.

Rumely v. *McCarthy*, 250 U. S. 283; *United States* v. *Lombardo*, 241 U. S. 73; and the other cases cited and quoted from by the Government on pages 46 to 48 of its brief support the position of the registrants in these cases. All these cases relied on by the Government involved a situation where the tribunal gave an order, or else the Congress gave an order, that required the filing of papers or reporting to and performing some act at the place where the office of the administrative agency was located. It has at all times been the position of the registrants in these cases that in such a situation, as is contended for here, the venue and jurisdiction of the offense (committed by failure to comply with the order to file a paper with the administrative agency or appear before the administrative agency) would be committed in the district where the office of the administrative agency where the act was required to be done was located.—See the main brief for the registrants in these cases at pages 26 to 31 where cases similar to those above cited are discussed and distinguished.

XXXV.

The registrants have not argued, and do not here argue, as suggested by the Government at the bottom of page 50 and at the top of page 51, that a defendant in a criminal case has a constitutional right to be prosecuted where he resides or the place where he was when the crime was committed. The registrants agree with the Government that the Constitution guarantees the right to be tried in the district where the crime was committed, irrespective of where the defendant resides or where he was when the crime was committed.

XXXVI.

The entire basis of the Government's argument for illegally transferring the crime from the district where the local board is located to the district where the hospital is situated rests solely upon the appearance of the registrant "before his local board." (See the brief at page 51.) Appearance before the local board and expressing a refusal to go forward has no magic in it like Aladdin's lamp as the Government thinks. It does not magically transfer the place of commission of the crime from the one district to the other. The act of refusal to proceed farther is what constitutes the crime. This omission occurs in the district where the local board is located and where the registrant refused to proceed farther. The specious argument at the bottom of page 51 of the Government's brief ought to be rejected.

CONCLUSION

The judgment of the Court in the *Johnston* and *Sokol* cases should be reversed and the judgment in the *Patteson* case should be affirmed for the reasons stated above and in the main brief for the registrants in these cases.

Respectfully submitted,

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April, 1956.